

PATRICIA ANN HENDERSON,)	Case No.: 1:20-cv-0562 JLT
)	
Plaintiff,)	ORDER GRANTING IN PART PLAINTIFF'S
)	MOTION FOR ATTORNEY'S FEES
v.)	PURSUANT TO THE EQUAL ACCESS TO
)	JUSTICE ACT, 28 U.S.C. § 2412
COMMISSIONER OF SOCIAL SECURITY,)	
)	(Doc. 22)
Defendant.)	
)	

Stuart Barasch, attorney for Plaintiff Patricia Ann Henderson, seeks an award for fees pursuant to the Equal Access for Justice Act under 28 U.S.C. § 2412(d). (Doc. 22) The Commissioner of Social Security has not opposed the motion. Because the Administrative Law Judge's decision was contrary to established standards set forth by the Regulations and the Ninth Circuit, the decision and the Commissioner's defense thereof, was not substantially justified. For the reasons set forth below, the motion for attorney fees under the EAJA is **GRANTED** in the modified amount of **\$6,077.28**.

24 In 2017, Plaintiff filed applications for a period of disability, disability insurance benefits, and
25 supplemental security income under Titles II and XVI of the Social Security Act. (Doc. 11-1 at 19.)
26 The Social Security Administration denied Plaintiff's applications for benefits at the initial level and
27 upon reconsideration. (*Id.*) Plaintiff requested an administrative hearing and testified before an ALJ on
28 April 6, 2019. (*Id.* at 19, 42.) The ALJ concluded Plaintiff was not disabled and issued an order denying

1 benefits on May 30, 2019. (*Id.* at 19-33.) The Appeals Council denied Plaintiff’s request for review of
 2 the decision on February 19, 2020 (*id.* at 5-7), and the ALJ’s determination became the final decision of
 3 the Commissioner.

4 Plaintiff initiated the action before this Court on April 20, 2020, seeking judicial review of the
 5 ALJ’s decision. (Doc. 1.) The parties exchanged confidential letter briefs, and Plaintiff filed her
 6 opening brief on December 10, 2020. (Doc. 16.) On February 8, 2021, the parties filed a stipulation
 7 for the matter to be remanded for an ALJ to issue a new decision. (Doc. 19.) Pursuant to the terms of
 8 the stipulation, the Court remanded the matter for further proceedings pursuant to sentence four of 42
 9 U.S.C. § 405(g), and judgment was entered in favor of Plaintiff on February 9, 2021. (Docs. 20, 21.)

10 Following the entry of judgment, Plaintiff filed the motion for fees under the EAJA now
 11 pending before the Court. (Doc. 22.) The Court ordered the Commissioner to file “[a]ny opposition to
 12 the motion, or a notice of non-opposition . . . no later than June 9, 2021.” (Doc. 23 at 1, emphasis
 13 omitted.) To date, the Commissioner has not filed an opposition to the motion or otherwise responded
 14 to Plaintiff’s request for fees.

15 **II. Legal Standards for EAJA Fees**

16 The EAJA provides that a court shall award fees and costs incurred by a prevailing party “in
 17 any civil action . . . including proceedings for judicial review of agency action, brought by or against
 18 the United States . . . unless the court finds that the position of the United States was substantially
 19 justified or that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). A party
 20 eligible to receive an award of attorney fees under the EAJA must be the prevailing party who
 21 received a final judgment in the civil action. 28 U.S.C. § 2412(d)(2)(H).

22 The party seeking the award of EAJA fees has the burden of proof that fees requested are
 23 reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 437 (1983); *see also Atkins v. Apfel*, 154
 24 F.3d 988 (9th Cir. 1998) (specifically applying these principles to fee requests under the EAJA). As a
 25 result, “[t]he fee applicant bears the burden of documenting the appropriate hours expended in the
 26 litigation, and must submit evidence in support of those hours worked.” *Gates v. Deukmejian*, 987
 27 F.2d 1392, 1397 (9th Cir. 1992); *see also* 28 U.S.C. § 2412(d)(1)(B) (“A party seeking an award of
 28 fees and other expenses shall . . . submit to the court an application for fees and other expenses which

shows . . . the amount sought, including an itemized statement from any attorney . . . stating the actual time expended”).

Where documentation of the expended time is inadequate, the court may reduce the requested award. *Hensley*, 461 U.S. at 433, 436-47. Further, “hours that were not ‘reasonably expended’” should be excluded from an award, including “hours that are excessive, redundant, or otherwise unnecessary.” *Id.* at 434. A determination of the number of hours reasonably expended is within the Court’s discretion. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484-85 (9th Cir. 1988).

III. Discussion and Analysis

A claimant who receives a sentence four remand in a Social Security case is a prevailing party for EAJA purposes. *Shalala v. Schaefer*, 509 U.S. 292, 301-02 (1993); *Flores v. Shalala*, 49 F.3d 562, 568 (9th Cir. 1995). Consequently, Plaintiff was the prevailing party.

A. Whether Defendant’s position was substantially justified

The Supreme Court has defined “substantially justified” as “justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In addition, “[a] substantially justified position must have a reasonable basis in both law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001).

Establishing that a position was substantially justified is a two-step process. 28 U.S.C. § 2412(d)(2)(D). First, “the action or failure to act by the agency” must be substantially justified. *Id.* Second, the Commissioner’s position taken in the civil action must be substantially justified. *Id.* The inquiry into whether the government had a substantial justification must be found on both inquiries. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1998). Thus, both the ALJ’s decision and the Commissioner’s arguments to the Court in defense of the administrative decision must have been substantially justified. To find that a position was substantially justified when based on violations of the Constitution, federal statute, or the agency’s own regulations, is an abuse of discretion. *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996).

The burden of proof that the position was substantially justified rests on the government. *Scarborough v. Principi*, 54 U.S. 401, 403 (2004); *Gonzales v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005). However, the Commissioner does not argue that the administrative decision was

1 substantially justified. Further, the Commissioner stipulated to a voluntary remand after Plaintiff filed
 2 a motion for summary judgment and did not defend the ALJ's determination before this Court. Thus,
 3 the Court finds the ALJ's decision was not substantially justified.

4 **B. Reasonableness of the Fees Requested**

5 The Ninth Circuit determined courts may not apply de facto caps limiting the number of hours
 6 attorneys can reasonably expend on "routine" social security cases. *See Costa v. Comm'r of Soc. Sec.*
 7 *Admin.*, 690 F.3d 1132, 1133-37 (9th Cir. 2012) ("we question the usefulness of reviewing the amount
 8 of time spent in other cases to decide how much time an attorney could reasonably spend on the
 9 particular case before the court"). Instead, "courts should generally defer to the 'winning lawyer's
 10 professional judgment as to how much time he was required to spend on the case.'" *Id.* at 1136, quoting
 11 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Nevertheless, the Court has an
 12 independent duty to review the evidence of hours worked and tasks undertaken to determine the
 13 reasonableness of the fees requested for the case. *Hensley*, 461 U.S. at 433, 436-47.

14 Mr. Barasch reports that several attorneys with Olinsky Law Group worked on this action,
 15 including Mr. Barasch, Howard Olinsky, Edward Wicklund, and Mary McGarigal. (Doc. 22-1 at 3.)
 16 Tasks completed by the attorneys and professional staff with Olinsky Law Group include
 17 communicating with Plaintiff; reviewing the ALJ's decision and the administrative record that was
 18 approximately 650 pages long; drafting Plaintiff's complaint, confidential letter brief, and opening
 19 brief; and preparing the request for EAJA fees now pending before the Court. (See Doc. 22-2 at 2-3.)
 20 According to Mr. Barasch, he and the other attorneys expended 28.3 hours on work related to Plaintiff's
 21 appeal, including 27.3 hours in 2020 and 1.0 hour in 2021. (Doc. 22-3 at 2.) In addition, the timesheets
 22 indicate eight paralegals with the firm expended 6.7 hours on Plaintiff's appeal. (Doc. 22-4 at 2.)

23 1. Duplicative tasks

24 The time sheets provided by counsel indicate several duplicated tasks due to the number of
 25 individuals who worked on the action. For example, after Mary McGarigal drafted Plaintiff's
 26 confidential letter brief, the document was reviewed and approved by Edward Wicklund, who billed
 27 0.6 hours for his review and approval. (See Doc. 22-2 at 2.) Stuart Barasch then indicated that he
 28

1 spent 0.3 reviewing the same letter brief, which he indicates that he reviewed, “finalize[d],” and filed.¹
 2 (*Id.*) Given the duplicative nature of the tasks performed by Mr. Wicklund and Mr. Barasch after the
 3 document was drafted by Ms. McGarigal, the Court will deduct 0.9 hours of attorney time. *See*
 4 *Gibson v. City of Chicago*, 873 F.Supp.2d 975, 987 (N.D. Ill. 2012) (eliminating time entries for
 5 duplicative tasks); *see also Lang v. Saul*, 2020 WL 4339496 at *4 (E.D. Cal. July 28, 2020) (declining
 6 to award time spent on reviewing the documents drafted by others at Olinsky Law Group).

7 The timesheets also indicate duplicated reviews of the opening brief. Mary McGarigal
 8 indicated that she spent 15 hours drafting the opening brief. (Doc. 22-2 at 2.) Mr. Wicklund indicates
 9 that he spent 1.0 hour related to a “senior review of the draft brief” and Mr. Barasch also reviewed the
 10 brief for 0.3 hours. There is no explanation why the draft brief required two other attorneys to review
 11 it prior to filing. Thus, the Court will deduct 1.3 hours of attorney time from the fee award for the
 12 duplicative nature of the document review. *See Gibson*, 873 F.Supp.2d at 987.

13 Finally, the timesheets indicate duplicative efforts related to the motion for EAJA fees now
 14 pending before the Court. The firm’s records indicate the motion was prepared by a paralegal, after
 15 which Mr. Olinsky indicated he reviewed the EAJA timesheets and “Finalize[d] EAJA Narrative.”
 16 (Doc. 22-3 at 3.) However, after Mr. Olinsky reported he finalized the document, Shannon Peressi and
 17 Mr. Barasch also billed 0.7 hour and 0.1 hour respectively, for finalizing the document and review the
 18 draft. (*Id.*). Therefore, the Court will deduct 0.8 hour of time from the fee award for the duplicative
 19 nature of the document review. *See Saul*, 2020 WL 4339496 at *4.

20 2. Clerical tasks

21 The Supreme Court determined that “purely clerical work or secretarial tasks should not be
 22 billed at a paralegal or lawyer’s rate, regardless of who performs them.” *Missouri v. Jenkins*, 491 U.S.
 23 274, 288 n. 10 (1989). For example, the time spent to e-file documents is routinely found to be clerical
 24 work that is non-compensable. *See L.H. v. Schwarzenegger*, 645 F. Supp. 2d 888, 899 (E.D. Cal. 2009)
 25 (finding organizing and updating files was clerical, and declining to award fees where the applicant
 26 “tendered no evidence that these are tasks that required the skill of a paralegal”). In addition, courts in
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28 ¹ Notably, the confidential letter briefs exchanged by the parties are not filed with the Court, and Plaintiff did not file her brief. However, Mr. Barasch also indicates there was no charge for the unmade filing. (*See* Doc. 22-2 at 2.)

the Ninth Circuit have determined drafting and preparing documents related to service of process are clerical tasks and reduced the number of hours awarded as fees accordingly. *See, e.g., Kirk v. Berryhill* 244 F. Supp. 3d 1077, 1084 (E.D. Cal. 2017) (“drafting letters and preparing documents related to representation and service of process could have been completed by experienced support staff”); *Bailey v. Colvin*, 2013 WL 6887158, at *4 (D. Or. Dec. 31, 2013) (denying fees for “service of process” because “the Court may not award fees for clerical work even when the work is performed by attorneys”). Because the timesheets submitted by Plaintiff include 0.6 hours for service of process by Jordan Harclerod, this time will be deducted from the fee award due to its clerical nature.

3. Hourly rates

Plaintiff requests “an hourly rate of \$207.78 for attorney time in 2020 and 2021” and \$125.00 for paralegal time. (Doc. 22-1 at 2.) Notably, the attorney hourly rates are consistent with the statutory maximum set by the Ninth Circuit for 2020, and the requested paralegal rate is within the range of accepted rates in the Fresno Division of the Eastern District of California. *See* “Statutory Maximum Rates Under the Equal Access to Justice Act,” available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited June 15, 2021); *see also Silvester v. Harris*, 2014 WL 7239371 at *4 (E.D. Cal. Dec. 2014) (“The current reasonable hourly rate for paralegal work in the Fresno Division ranges from \$75 to \$150, depending on experience”). Consequently, the Court finds the hourly rates requested are reasonable.

4. Amount to be awarded

With the deductions set forth above, attorneys with Olinsky Law Group expended a total of 26 hours on compensable work in this action on behalf of Plaintiff. The paralegals and professional staff expended a total of 5.4 compensable hours this action. The Court finds the total of 31.4 hours to be reasonable in light of the tasks performed by counsel and the professional staff, which resulted in a remand for further proceedings. Accordingly, Plaintiff is entitled to an award of **\$6,077.28**, which includes \$5,402.28 for work completed by counsel and \$675.00 for work completed by the paralegals.

C. Expenses

Plaintiff seeks “expenses in the amount of \$17.25 for reimbursement of the service of process expenses.” (Doc. 22-1 at 3.) Significantly, however, the Court granted Plaintiff’s request to proceed

1 *in forma pauperis* in this action and directed the U.S. Marshal “serve a copy of the complaint,
 2 summons, and this order upon the defendant.” (Doc. 4 at 4.) When a plaintiff proceeds *in forma*
 3 *pauperis* and the U.S. Marshal has been directed to complete service, the plaintiff may not recover
 4 expenses related to service. *DeArmon v. Colvin*, 2013 U.S. Dist. LEXIS 137858 at *5 (E.D. Cal. Sept.
 5 25, 2013). Accordingly, Plaintiff’s request for expenses is **DENIED**.

6 **D. Assignment of the Fee Award**

7 Plaintiff requests that the EAJA fee award be made payable to counsel, pursuant to a fee
 8 agreement she signed. (*See* Doc. 22-1 at 3.) In *Astrue v. Ratliff*, 560 U.S. 586 (2010), the Supreme
 9 Court determined that EAJA fees must be made payable to the “prevailing party.” As a result, the
 10 payment is subject to a government offset to satisfy any pre-existing debt owed by a claimant. *See id.*,
 11 560 U.S. at 592-93. Notably, under the Anti-Assignment Act, a claim against “the United States may
 12 not be assigned to a third party unless [certain] technical requirements are met.” *United States v. Kim*,
 13 806 F.3d 1161, 1169 (9th Cir. 2015); 31 U.S.C. § 3727. “[I]n modern practice, the obsolete language of
 14 the Anti-Assignment Act means that the Government has the power to pick and choose which
 15 assignments it will accept and which it will not.” *Kim*, 806 F.3d at 1169-70. In addition, the Anti-
 16 Assignment Act “applies to an assignment of EAJA fees in a Social Security Appeal for disability
 17 benefits.” *Yesipovich v. Colvin*, 166 F.Supp.3d 1000, 1011 (N.D. Cal. 2015).

18 Because Plaintiff has assigned her rights to counsel, the EAJA fees should be made payable
 19 directly to Plaintiff’s counsel, subject to any government debt offset and the government’s waiver of
 20 the Anti-Assignment Act requirements. *See Yesipovich*, 166 F.Supp at 1011; *see also Beal v. Colvin*,
 21 2016 U.S. Dist. LEXIS 124272 (N.D. Cal. Sept. 13, 2016) (holding where there was “no information
 22 on whether plaintiff owes any debt to the government[,]. . . the EAJA fee shall be paid directly to
 23 plaintiff’s counsel, subject to any administrative offset due to outstanding federal debt and subject to
 24 the government’s waiver of the requirements under the Anti-Assignment Act”). If the government
 25 chooses to not accept the assignment, payment shall be made to Plaintiff and mailed to her attorney.

26 **IV. Conclusion and Order**

27 As a prevailing party, Plaintiff is entitled to an award of attorney’s fees under the EAJA
 28 because the ALJ’s decision was not substantially justified, and the Commissioner did not defend it

1 before this Court. *See* 28 U.S.C. § 2412(d)(2)(H). With the deductions set forth above, Olinsky Law
2 Group expended a total 31.4 hours on compensable work in this action, which is reasonable in light of
3 the tasks performed on Plaintiff's behalf and results achieved. Based upon the foregoing, the Court

4 **ORDERS:**

- 5 1. Plaintiff's motion for attorney's fees (Doc. 22) is **GRANTED** in part, in the modified
6 amount of **\$6,077.28**;
- 7 2. Plaintiff's request for expenses is **DENIED**;
- 8 3. Defendant **SHALL** determine whether Plaintiff's EAJA attorney fees are subject to any
9 offset and, if the fees are not subject to an offset, payment shall be made payable to
10 Plaintiff. If the Government decides to accept the assignment of fees, payment shall be
11 made payable to Counsel, Stuart Barasch; and
- 12 4. Payment **SHALL** be mailed to Plaintiff's counsel of record, Stuart Barasch.

13
14 IT IS SO ORDERED.

15 Dated: **June 16, 2021**

/s/ Jennifer L. Thurston
CHIEF UNITED STATES MAGISTRATE JUDGE